VIRGIL LOPEZ ET AL.

IBLA 73-348 Decided June 17, 1975

Appeal from denial of protest against filing of plat of survey under Special Instructions, Group 156, Florida; exceptions filed to recommended decision finding surveyed islands not swamp and overflowed in character as of September 28, 1850.

Affirmed.

1. Contests and Protests: Generally -- Evidence: Burden of Proof -- Rules of Practice: Appeals: Burden of Proof -- Surveys of Public Lands: Generally -- Swamplands

   A protestant against the filing of a survey plat bears the burden of proof, i.e., the risk of nonpersuasion, to show why the plat should not be accepted, and the applicant state has the burden of demonstrating that land is swamp and overflowed in character. The protestant against the filing of a survey plat who claims that title to the land passed to the state under the Swamp Lands Act, 43 U.S.C. §§ 981-986 (1970), is properly assessed with the burden of proof, i.e., the risk of nonpersuasion, in the proceeding.

2. Boundaries -- Public Lands: Generally -- Surveys of Public Lands: Generally -- Tidelands

   The survey of an offshore island without the use of 18.6-year mean high tide data, which governs boundary disputes between private upland and tideland owners, is proper; the 18.6-year lunar cycle tide data does not govern meander lines established in public land surveys.

Meander of an offshore island is ordinarily based on a mean high tide determined by the vegetative line upon the soil in accordance with the Bureau of Land Management's Manual of Surveying Instructions.

3. Contests and Protests: Generally -- Evidence: Burden of Proof -- Rules of Practice: Hearings -- Swamplands -- Tidelands

In a hearing held to determine whether lands were swamp and overflowed at the time of the Swamp Lands Act, 43 U.S.C. §§ 981-986 (1970), the parties asserting the state's title fail to meet their burden of proof when the evidence submitted indicates that the mangrove area claimed as swamp land is in fact below the line of mean high tide, and was properly delineated from the upland by the meander line.

4. Public Lands: Generally -- Surveys of Public Lands: Generally -- Tidelands

The meandering of the public land of an offshore island is properly based on a mean high tide line established at the vegetative line upon the soil, in accordance with the provisions of the Bureau of Land Management's Manual of Surveying Instructions, and a protest against the filing of a plat of survey based on such a mean high tide line is properly rejected.

5. Authority to Bind Government -- Public Lands: Generally -- Swamplands

The United States is not estopped to assert title to, survey, or deny the swamp and overflowed character of public lands constituting offshore islands in Florida either by Departmental inaction on the State's swamp land application, or by inclusion of the islands in a swamp land selection

list, or by the survey protestants' adverse chain of title and claims of occupancy and use.

6. Contests and Protests: Generally -- Surveys of Public Lands: Generally -- Swamplands

Demonstration that the field notes accompanying the plat of survey inaccurately or incompletely recite the history of the lands surveyed does not require rejection of the survey or field notes, when it is not disputed that the field notes accurately describe the evidence of the history of settlement and use visible during examination and survey, and when it is concluded that the survey itself was properly executed.

7. Boundaries -- Public Lands: Generally -- State Grants -- Surveys of Public Lands: Authority to Make

The Secretary of the Interior is authorized and under a duty to determine what lands are public lands and to survey such lands. Neither the Acts admitting Florida into the Union, nor the Reconstruction Act of March 2, 1867, divested the Secretary of the Interior of that authority regarding islands in the State of Florida, nor divested the United States of title to any public lands in the State.

APPEARANCES: Mallory H. Horton, Esq., of Horton & Perse, Miami, Florida, and Lewis H. Fogle, Jr., Esq., of Fogle, Fordham & Connelly, Miami, Florida, for appellants Virgil and Abbey Lopez, Martin and Marcella Bowen, Walter G. and Mary Sorokoty, Omar S. and Margaret Thacker, and Walter L. and Cecile Thomas; J. T. Blackard, Esq., of Knight, Peters, Hoeveler, Pickle, Niemoeller & Flynn, Miami, Florida, for appellant B. B. Leigh; Harold L. Greene, Esq., of Taylor, Brion Buker, Hames, Greene & Whitworth, Miami, Florida, and Williams, Pannell & Mathews, Hickory, North Carolina, for appellants William and Sally Jo Fox; Ronald E. Lambertson, Esq., Office of the Solicitor, Department of the Interior, for the United States.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Virgil Lopez et al. 1/ have filed exceptions to the recommended decision of Administrative Law Judge Robert W. Mesch, which recommends that appellants' protest against the filing of the plat of survey of Pavilion Key and Mormon Key in T. 55 S., R. 30 E., T.M., Florida, be dismissed. By Special Instruction of March 30, 1972 (Ex. 16), the Division of Cadastral Survey, Eastern States Office, Bureau of Land Management (BLM), authorized the examination and conditional survey of the two islands in connection with a pending swamp land selection by the State of Florida. The examination and survey were made between May 30 and June 6, 1972, and the Chief, Division of Cadastral Survey, BLM, accepted the survey plat of the two islands on June 30, 1972 (Ex. 15).

Appellants, and the Internal Improvement Trust Fund of the State of Florida, filed protests against the official filing of the plat of survey on the grounds: (1) that the United States was estopped to deny the classification, in Selection List No. 58, of the lands as swamp and overflowed lands within the meaning of the Swamp Lands Act of September 28, 1850, 9 Stat. 519, 43 U.S.C. §§ 981-986 (1970); (2) the survey demonstrated that the lands were in fact swamp and overflowed within the meaning of the Swamp Lands Act; (3) the survey erroneously described the history of the habitation and use of the keys; (4) the survey erroneously determined the area and character of the keys by failing to follow the BLM's Manual of Surveying Instructions (1947) in a number of particulars; and (5) that the Department of the Interior has no jurisdiction over the two keys as they contain no public lands and "at all times material were sovereign lands of the State of Florida." (Protest brief for appellants at 3.)

The Chief, Division of Cadastral Survey, Eastern States Office, BLM, who had executed the survey, filed a rebuttal to the protest which the Chief, Division of Cadastral Survey, BLM, largely adopted in his decision rejecting the protest. He ruled: (1) that the inclusion of these lands in Swamp Selection List No. 58 was not final action of the Department of the Interior certifying these lands to the State of Florida, so that there is no representation of the character of the lands the Department could be estopped to deny; (2) the survey demonstrated that the mangrove area claimed

1/ The other appellants are Abbey Lopez, Martin Bowen, Marcella Bowen, Walter G. Sorokoty, Mary Sorokoty, Omar S. Thacker, Margaret Thacker, Walter L. Thomas, Cecile Thomas, B. B. Leigh, William Fox and Sally Jo Fox.

by protestants to be swamp in character was below the mean high tide line and therefore constituted tideland belonging to the State of Florida, and therefore was not cognizable in computing the area which was swamp and overflowed; (3) the surveyor accurately outlined the history of the keys through research and local inquiry; (4) the surveyors executed the survey in accordance with the Manual of Surveying Instructions in every particular challenged by protestants; and (5) that the lands surveyed were properly determined, upon examination, to be public lands of the United States subject to survey, and not sovereign lands of the State of Florida.

On appeal to this Board, the protestants, except the State of Florida, which did not appeal, reasserted their grounds for protest in the form of a rebuttal to each holding of the Chief, Division of Cadastral Survey. Further, they requested a hearing in order to establish that the lands were swamp and overflowed within the meaning of the Swamp Lands Act, 43 U.S.C. §§ 981-986 (1970). On August 6, 1973, the Board granted the request for a hearing and referred the case to the Administrative Law Judge for a recommended decision on the issue whether or not the lands were swamp and overflowed on September 28, 1850. The law governing this issue follows.

Section 1 of the Act of September 28, 1850, 9 Stat. 519, as amended, 43 U.S.C. § 982 (1970), granted to the state in which they are situated, "the whole of the swamp and overflowed lands, made unfit thereby for cultivation, and remaining unsold on or after the 28th day of September, A.D. 1850 * * *." The Swamp Lands Act was a present grant that gave the states an inchoate title to lands that were swamp and overflowed on the date of the Act. Work v. State of Louisiana, 269 U.S. 250 (1925); Michigan Land & Lumber Co. v. Rust, 168 U.S. 589 (1897). The Department of the Interior retains jurisdiction over such lands until the determination of their character is made 2/ and patent issues according to the provisions of section 2 of the Swamp Lands Act, 43 U.S.C. § 983 (1970). United States v. O'Donnell, 303 U.S. 501, 514-15 (1938); Work v. State of Louisiana, supra; Brown v. Hitchcock, 173 U.S. 473 (1899); Michigan Land & Lumber Co. v. Rust, supra; Martin v. Marks, 97 U.S. 345 (1878).

2/ By Circular dated November 21, 1850, the Commissioner of the General Land Office provided that swamp land grant states could take on the basis of the public land survey field notes, or on the basis of lists compiled by state agents and presented to the Surveyor-General with proof of the swamp and overflowed character of the lands listed. The State of Florida chose the latter method. T. Donaldson, The Public Domain, 698 (1884).

In determining whether lands are swamp and overflowed, the Department is guided by the rule that lands below the mean (or ordinary) high water mark of a tidal (or navigable) body of water belong to the state by virtue of its sovereignty, and are not public lands subject to the swamp land grant. E.g., Hardin v. Jordan, 140 U.S. 371 (1891); Mitchell v. Smale, 140 U.S. 406 (1891); Goodtitle v. Kibbe, 18 U.S. (9 How. 471) 228 (1849); Pollard's Lessee v. Hagan, 15 U.S. (3 How. 212, 229-30) 391, 401-03 (1844). For lands above the mean high water mark of navigable or tidal bodies of water, "* * * all legal subdivisions, the greater part whereof is wet and unfit for cultivation, shall be included in said [swamp land] lists and plats, but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom." 43 U.S.C. § 984 (1970).

At the hearing, appellants introduced the documents submitted in support of their appeal, including abstracts of title showing the derivation of their claims to the islands (Exs. 1-2), and aerial photographs with overlays showing the land surveyed by the United States and the land they claim is swamp (Exs. 3, 17-18).

Appellants called as an adverse witness Lane J. Bouman, Chief, Division of Cadastral Survey, Eastern States Office, BLM, who examined the islands and executed the survey. He later testified on behalf of the BLM. He and Louis D. Gilbert, a BLM cadastral surveyor, spent five days on the two islands in May and June 1972 (Tr. 56). He testified they located the mean high tide line in accordance with the Manual of Surveying Instructions (Tr. 52-53, 222), by finding the "line marked upon the soil where the [tidal] action and the inundation over sufficient periods deprives the soil of its vegetation." (Tr. 53. See Tr. 74, 79-80, 222-25, 252-53.) They began the survey of Pavilion Key from a cove on the southeast part of the island where the effect of the tides was clearest on the vegetation and soil (Tr. 224). They established the mean high tide line at this vegetative line and circumscribed the island by transit and tape, and the use of a level line to check that the vegetative line was uniform around the island (Tr. 226-27). They placed the meander corners between secs. 6 and 7, T. 55 S., R. 30 E., at the debris line on the west side of the island and at the vegetative line on the east side of the island (Tr. 230).

On Mormon Key, Mr. Bouman and Mr. Gilbert located the litter from the tides that correlated with the tide level on Pavilion Key and located the meander corner between secs. 14 and 23, T. 55 S., R. 30 E., at the corresponding vegetative line (Tr. 238, 271).

Mr. Bouman testified that he twice witnessed high tide on Pavilion Key. On June 6, 1972, water stood "6.6 feet" from the

meander corner he had set (Tr. 79, 235), and on October 15, 1973, he was over his knees in water near the eastern meander corner, at which time the water stood within 20 feet of the meander corner (Tr. 242-43). He also testified to the distinctly upland character of the vegetation within the area he surveyed, and the nature of the mixed black and red mangrove forest in the area to the east of his meander line on both islands (Tr. 231-32).

In support of their contention that the survey erroneously determined the mean high tide line and thus erroneously determined the amount and nature of "public land," appellants called Lester L. Bulson, a registered land surveyor with experience determining boundaries in mangrove areas in Florida (Tr. 85, Ex. 6), and Gordon Farabee, field party chief for the engineering company that employs Mr. Bulson (Tr. 155-56). They visited and photographed the two islands on November 16, 1972, and located the survey meander corners placed by Mr. Bouman (Ex. 6, Tr. 95, 156-57).

They both testified that they use and rely on the presence or absence of red and black mangrove in order to determine the location of the mean high tide line (Tr. 97-98, 158, 164, 173). Their standard for determining the mean high tide line, according to the testimony of Mr. Bulson (Tr. 98), was:

> The red mangrove grows real healthy below mean high tide, but it does not grow very good above. The black mangrove does not grow below mean high tide and it grows well above mean high tide.

Using this standard, they retraced the survey meander line. They determined that the aerial photographs (Exs. 17-18) show a line of demarcation between the higher and lower ground (Tr. 119, 130), that represents the different vegetation found, according to Mr. Bulson, in the absence of salt water (Tr. 120-21). However, outside the Bureau's survey line, they testified they saw mostly black mangrove, which they testified did not grow below mean high tide (Tr. 121-22, 164, 173). Mr. Farabee testified that the mean high tide line Mr. Bulson drew on Exhibits 17 and 18 approximated the beginning of the black mangrove forest and end of the good "grade" red mangrove (Tr. 158, 167, 177). They both testified that about half of the tides cover the black mangrove area, corroborating for them their view that the mean high tide line is at the outside edge of the black mangrove concentration (Tr. 129, 150, 161). On the day Mr. Bulson and Mr. Farabee visited the islands, the high tide did not cover the area east of the east meander corner on Pavilion Key (Tr. 96, 161).

In rebuttal the BLM, besides calling Lane J. Bouman, whose testimony has been summarized above, also called Dr. Alan K. Craig,

an associate professor at Florida Atlantic University, and the holder of graduate degrees in geography and anthropology (Tr. 285-87). He spent 30 to 50 days beginning in 1969 on Pavilion Key doing the research for a publication on the island's phytogeography (plant distribution). He traversed the island west to east with lines, along which frames were placed at regular intervals so that the plants could be counted and identified systematically (Tr. 290-93). He observed that red and black mangrove mix throughout the area marked as tideland on the plat of survey so that he would be unable to draw a boundary between mangrove communities anywhere (Tr. 307-08, 314).

He also noted the existence of a distinct boundary he labelled the "esplanade," between the mangrove community and the upland plant community, running the length of Pavilion Key and closely approximating the survey meander line for the east side of the island (Tr. 295-97). He explained this unvegetated line between upland and mangrove communities as the result of salt buildup from tidal waters standing at that point, and as the interface between the underground salt water and the "lens" of fresh water saturating the upland soil (Tr. 302-03). 3/

[1] At the hearing, the Judge ruled that the burden of proof, i.e., the risk of nonpersuasion, was on appellants to show that the survey was in error and that the islands were "swamp and overflowed" in character (Tr. 7-8). Appellants argue they had no such duty: "The survey was made by the government -- it had the initial and final duty to perform the survey as required by its own instructions and the applicable law." 4/ (Appellants' Exceptions to Recommended Decision at 2.)

3/ The foregoing discussion was adapted and condensed from the discussion of the evidence in the Recommended Decision of the Administrative Law Judge at 13-24.

4/ Appellants argue that the Department has the burden to show the accuracy of its survey because the matter of title to the islands was initially raised by the United States in a quiet title action, United States v. Florida, No. 71-389 Civ. Wm., (S.D. Fla., filed March 10, 1971, dismissed without prejudice January 1, 1973), against appellants and others. They note the United States would have had the burden of showing the validity of its own title in the District Court action, and could not have relied on any flaw in their title. They argue that it is unfair for the burden of proof to be switched to them in the administrative forum. The short answer to this is that as the Department had never rejected the State of Florida's swamp land application for these islands (see Ex. 12), the quiet title action was in this sense premature. Until the Department finally ruled on the State's application, the land was subject to the jurisdiction of the Department and its rules and procedures governing the adjudication of swamp land issues, including burden of proof.

This Board has held that the burden of proof, i.e., the risk of nonpersuasion, lies on one challenging the filing of the survey. Mrs. J. W. Moore, 8 IBLA 261 (1972); see Stanley G. West, 14 IBLA 26, 27 (1973); Nina R. B. Levinson, 1 IBLA 252, 78 I.D. 30 (1971). Similarly, this Board has held that the burden of proof on the issue of the swamp character of land is upon the swamp land applicant. State of California, 8 IBLA 164, 165 (1972); State of Iowa v. Chicago, Milwaukee & St. Paul Ry. Co., 30 L.D. 120 (1900), and cases cited therein. Appellants' protest rests on the assertion that the islands were either improperly surveyed or not public land subject to survey, because it was "swamp and overflowed" within the meaning of the Swamp Lands Act. As the burden of proof on each proposition would be upon appellant were they independent issues, the burden of proof lies with appellants in this proceeding. We affirm the Judge's ruling on this point.

[2] Appellants argue that the survey was erroneously made because the cadastral surveyors failed to establish the mean high tide line in accordance with the direction of the Supreme Court in Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10, 27 (1935):

> [T]he Court of Appeals directed that in order to ascertain the mean high tide line with requisite certainty in fixing the boundary of valuable tidelands * * *, "an average of [the high tides for] 18.6 years should be determined as near as possible." We find no error in that instruction.

The Judge ruled (Rec. Dec. at 11-12) that the 18.6-year rule was not applicable to the survey and protest involved here. He noted that the Borax rule was applied in determining the boundary between parcels of land out of federal ownership, and that the Court in Borax did not invalidate or nullify the public land survey, with its meander line, that governed the parties' title (Rec. Dec. at 9-10). Meander lines which are run along navigable bodies of water are run to define in a general manner the sinuosities of the body of water and to determine the quantity of public land in the subdivisions so surveyed. It is well settled that the boundary of the parcel so surveyed is not the meander line but the shore or mean high water mark. United States v. Lane, 260 U.S. 662 (1923); Hardin v. Jordan, supra; Mitchell v. Smale, supra.

---

fn. 4 (continued)
E.g., Heath v. Wallace, 138 U.S. 573 (1891); State of Florida, 18 L.D. 26, 30 (1894). See State of California, 8 IBLA 164, 165 (1972).

Thus, in running a meander line representing the mean high water line, the cadastral surveyor is not drawing the boundary of the tract, which is the mean high tide line, and he is not bound to use the Borax rule of 18.6 years of tidal data to locate the meander line. Cf. Udall v. Oelschlaeger, 389 F.2d 947 (D.C. Cir. 1968). We affirm the Judge's ruling that Borax did not invalidate or nullify the method of public land survey set out in the Manual of Surveying Instructions, and did not compel the surveyors to use 18.6-year tidal data in surveying Pavilion and Mormon Keys. 5/

[3] Appellants argue that the testimony of Mr. Bulson and Mr. Farabee showed that the mean high tide line was the line they drew on Exhibits 17 and 18, which represents to them the approximate outside limit of black mangrove growth and the beginning of the solid red mangrove growth. The bulk of the lands on the east side of the upland of the two islands, marked as tidelands on the plat of survey, were in their opinion swamp and overflowed, unfit for cultivation and subject to some tidal action, but above the mean high tide line. 6/ As such, appellants conclude that this land should have been included in the survey to determine if the subdivisions platted are now and were on September 28, 1850, swamp and overflowed lands that passed to the State of Florida.

5/ Appellants strenuously object to the Judge's ruling (Rec. Dec. at 11-12):

"If a protestant or appellant believes that it is necessary to determine the mean high tide line with the precision embodied in the method adopted in the Borax case, then the burden of establishing the line under that criteria should be on the protestant or appellant and not on the Bureau."

Obviously, if appellants showed that the survey meander line was erroneously located by use of 18.6-year tidal data, they would have so met their burden of proof. We reject the implication that, had appellants shown the survey was in error for its failure to use the Borax standard tidal data, they would have had to locate the 18.6-year mean high tide line in order to prevail. Appellants' burden was to show error in the method or execution of the BLM survey, not to locate affirmatively their contrary survey line. However, because of our ruling that the BLM was not required by law to use 18.6-year tidal data in surveying the islands, this error is moot.

6/ Mr. Farabee testified that in his experience the black mangrove-red mangrove dividing line had always reflected the mean high tide line when his crew used Coast and Geodetic Survey long-term mean high tide data (Tr. 164). However, appellants did not present any long-term mean high tide data for Pavilion or Mormon Keys or the nearby coast.

After discussing the testimony on the location of the mean high tide line summarized above, the able Judge (Rec. Dec. at 24-27) ruled:

> I find the evidence presented by the Bureau with respect to the mean high tide line more convincing and reliable than the evidence adduced by the appellants. I accept the line of mean high tide as shown on the plat of survey over the line approximated by the appellants' surveyors. I reach this conclusion for the following reasons:
>
> 1. The appellants' surveyors, who have had no formal education in plant ecology or the determination of where plant communities might be found, based their determination of the mean high tide line on the proposition that black mangrove trees do not grow below mean high tide. I simply cannot accept the validity of this proposition in view of the opinion expressed by Dr. Davis, who was characterized as an eminent authority on mangrove associations, and the concurring opinion of Dr. Craig, who specializes in plant geography, that black mangrove trees are found in areas that are generally covered at high tide.
>
> 2. I have no reason to question the veracity of Mr. Bouman, who testified (1) that in October, when according to the appellants' principal surveyor, most high tide averages go down, he found, shortly before the high tide arrived, (a) water within 20 feet of the meander corner, (b) a foot of water in the area of the black mangrove trees, and (c) over 2 feet of water in the red mangrove trees at a point above the appellants' mean high tide line; and (2) that in the area occupied by the mangrove community, which according to the appellants' principal surveyor is relatively flat and has a very slight slope, he found definite dark-colored saturated water lines on the mangroves at a height of 2.7 feet at the outer edge of the mangroves in the area of the appellants' mean high tide line. (Tr. 151, 233)
>
> 3. I have no reason to discount the opinion expressed by Dr. Craig, who is far more familiar with the islands than any of the witnesses, that at high tide you are going to get water encroaching on the "esplanade" or the approximate point shown on the plat of survey as the mean high tide line.

4. Both Mr. Bulson and Mr. Farabee testified that approximately half of the high tides cover the relatively flat area of the mangrove forest over distances of 1,000 feet or more between their mean high tide line and the Bureau's line. (Tr. 109, 129, 149, 151, 161; Ex. 6, p. 5) Mr. Farabee testified that the area below their mean high tide line is always under water. (Tr. 161) Mr. Bulson expressed agreement with the statement that the outer zone of red mangroves are nearly always flooded by even the low tide. (Tr. 123) I cannot reconcile this testimony with the proposition that the mean high tide line is at the inner edge of the outer zone of red mangroves and only 50 to 75 feet inland from the outer edge of the relatively flat lying mangrove forest.

5. The appellants have not questioned, and appear to be in general agreement with the line of mean high tide as shown on the plat of survey along the westerly sides of the two keys. Mr. Bouman testified that the meander corners on the western and eastern sides of Pavilion Key were within approximately 3 inches of being level and that the upland vegetation and tidemarks on Mormon Key correlated with the tide level that they had transferred from Pavilion Key. With the possible exception of the effect of the wind on different sides of an island, it would seem that the mean high tide line should be at the same level around the island. It is difficult to believe that the mean high tide line would follow approximately the line of distinct upland vegetation along the western sides of the islands and then drop below the upland vegetation to the edge of the red mangroves along the eastern sides of the islands.

The evidence is not sufficient to support the conclusion that the line of mean high tide is at the edge of the outer zone of red mangroves as contended by the appellants. Nor is the evidence sufficient to support the conclusion that the Bureau's survey was improperly executed. The appellants have not sustained their burden of establishing the truth of their contention that the plat of survey does not correctly depict the mean high tide line.

(Footnotes omitted.)

Having concluded that appellants did not meet their burden of proof to show the error in the surveyor's location of the meander line representing the mean high tide, the Judge went on to hold that because no evidence was introduced tending to show that the land returned as upland on the survey was swamp and overflowed, the islands were not at the time of survey swamp and overflowed. The parties stipulated that the islands were in existence in 1850 (Tr. 198, 322), and the evidence supports the conclusion that both keys have substantially the same shape as they had at and soon after the time of statehood and the Swamp Lands Act (Tr. 58-59, 109-10, 265-66, 309-11, Ex. C). The Judge thus answered the issue of fact set for decision in the negative: the lands in issue were not swamp and overflowed as contemplated by the Swamp Lands Act on September 28, 1850.

We adopt the Judge's recommendation and discussion on this issue with the following comments.

[4] In their exceptions to the Recommended Decision, appellants reassert that the survey method was erroneous, independent of the Borax rule discussed supra, because the surveyors failed to locate the mean high tide line in accordance with the Manual of Surveying Instructions and their Special Instructions (Ex. 16). 7/ Mr. Bouman testified that he followed section 530 of the Manual of Surveying Instructions in distinguishing tidal from overflowed lands (Tr. 221), and that he located the mean high tide line in accordance with section 226 of the Manual of Surveying Instructions, which describes the high water mark as "the line which the water impresses on the soil by covering it for sufficient periods to deprive it of vegetation." (Tr. 221-23. See Tr. 53, 74, 79-80, 252-53.) Mr. Bouman testified that it was the practice of surveyors to locate the meander line on an offshore island by use of the wave line and "vegetative lines." (Tr. 223.)

The Manual of Surveying Instructions' reference to the line at which vegetation ceases, intended to apply specifically to rivers and lakes, cannot be literally followed in an area like that at issue under either party's definition of mean high tide; red mangrove grows below appellants' proposed mean high tide line. However, Mr. Bouman did locate the line at which purely upland vegetation ceased (Tr. 224-25, 232). As we adopt the Judge's findings quoted above on the presence of black and red mangrove in a mixed community below the mean

7/ The Special Instructions for the survey of these islands (Ex. 16) specifically refer to the Manual of Surveying Instructions section 233 (Islands), and sections 530-535 (Swamp and Overflowed Lands, Tidelands).

high tide line, 8/ we approve the use of the vegetative line and wave line located and meandered in the survey at issue. Appellants' argument that the survey failed to meet the requirements of the Manual of Surveying Instructions or the Special Instructions is rejected.

[5] Appellants argued in their brief to the Administrative Law Judge that the Government is estopped to deny that the islands come within the Swamp Lands Act (Posthearing Brief for Appellants at 12-14). Appellants find the estoppel in: (1) the inclusion of these two islands in Swamp Selection List No. 58, dated October 8, 1888 (Ex. 4); (2) the "open, notorious and continuous" claims of the "owners and their predecessors in title;" and (3) the failure of the Department of the Interior to act on Selection List No. 58 for 85 years. The Judge rejected this argument and appellants have taken exception to the ruling.

We affirm the Judge and reject the appellants' claim of estoppel. As Exhibit 12 recites, subsequent selection lists were prepared for the Everglades area, and Patent No. 137, April 29, 1903, issued based on Selection List No. 107. The patent 9/ explicitly excludes "all islands in the Gulf of Mexico adjacent to the mainland * * *." Selection List No. 58 and Patent No. 137 offer no representation or authorized action by the Department indicating that the islands here had been found swamp and overflowed and thus approved for patent to the State of Florida. The prerequisite for the application of this rule is reasonable reliance on the conduct of the party to be estopped in the absence of knowledge of the true facts. United States v. Georgia-Pacific Co., 421 F.2d 92, 96-97 (9th Cir. 1970). We find this element missing here.

Exhibit 21, the memorandum from the Office of the Solicitor to the Justice Department, Land and Natural Resources Division, concludes that the exclusion of the offshore islands from the later selection lists and Patent No. 137 was not a rejection of the State's swamp land application. Such lands were excluded from patent in order to provide for later, separate consideration. When so treated, regulation 43 CFR 1810.3(a) is invoked:

8/ We defer to the Judge's findings to the extent that they are based on his evaluation of the credibility of the witnesses. See United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417-18 (1973); State Director for Utah v. Dunham, 3 IBLA 155, 78 I.D. 272 (1971).

9/ Patent No. 137 is set out as the first document of title in the abstracts of title to the two keys appellants submitted at the hearing (Exs. 1-2).

> The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act, or delays in the performance of their duties.

We are aware that estoppel has been held to apply against the United States when its absence would work severe injustice and the public interest would not be damaged by its imposition. United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973), citing Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970). However, the estoppel asserted here would divest the United States of title to land which was never patented, and for which patent was never approved under the public land laws. Further, adverse possession or claim of title 10/ to public lands does not divest the Government of title nor estop it from asserting title. Beaver v. United States, 350 F.2d 4, 8-9 (9th Cir. 1965), cert. denied, 383 U.S. 937 (1966), quoting United States v. State of California, 332 U.S. 19, 39-40 (1947); see Hudson Investment Co., 17 IBLA 146, 169-73, 81 I.D. 533, 544-46 (1974). For these reasons estoppel, whether grounded on laches, adverse possession or any asserted representation concerning the character of the keys, does not apply against the United States in this case.

We adopt the Judge's recommendation that the survey meander line representing mean high tide was properly determined and drawn on both islands. This renders moot discussion of the Judge's alternative finding (Rec. Dec. at 28-38), to which appellants take strenuous exception, that even if appellants' mean high tide line is adopted, they did not demonstrate the land between the survey meander line and their mean high tide line to be swamp and overflowed in character. 11/

[6] We turn now to the issues raised by the appeal which were not disposed of by the factual issue tried at the hearing. In support of their appeal to the Board, and at the hearing, appellants submitted documents to show that the field notes accompanying the

---

10/ No application under the Color of Title Act, 43 U.S.C. § 1068 (1970), is before us.

11/ Appellants argued that their testimony on the amount and character of "the overflowed lands" was uncontroverted by the Government, and must be adopted.

On the issue of the arability of the keys, we note that the plat of survey (Ex. 15) concludes, "The high salinity of the soil and the lack of potable water render the islands unfit for cultivation of other than halophytic [salt tolerating] plants."

survey plat erroneously describe the history of settlement and use of the two islands. As the Special Instructions authorizing the conditional survey requested that settlement and use, and the past condition of the keys, be included in the field notes, appellants argue that the survey was unacceptable without such information, and the answer to their protest by the Chief, Division of Cadastral Survey, inadequate. Appellants argue: that Pavilion Key had a post office from February 8, 1904, to July 31, 1908 (Ex. 8), which indicates continuous settlement; that the plat misleadingly says merely that habitation on Mormon Key was more permanent than on Pavilion Key, and they assert that in fact the island was continuously inhabited from 1896 to 1946 by Leon Hamilton, Roy Tooke and their families (Ex. 1); and the islands have been cultivated.

Appellants presented no evidence showing cultivation on either island. Mr. Bouman testified that he knew that a post office existed on Pavilion Key, but he did not so note in the survey field notes because no physical evidence of its presence remained (Tr. 60-63). However, the Special Instructions regarding use and settlement were specifically directed at the physical investigation of the islands. The field notes do indicate what physical evidence of past use and improvement the surveyors discovered during their on-the-ground examination. Although the field notes do lack the material indicated, appellants did not show that the description of the physical examination made by the surveyors was inaccurate or incomplete. We find this nominal deficiency does not violate the Special Instructions, or vitiate the accuracy of the survey. The protest on this ground is dismissed.

[7] Appellants have also appealed the Cadastral Surveyor's rejection of their protest of the survey on the ground that title to the islands vested in the State of Florida by virtue of the Constitution of Florida of 1868 (Ex. 5), which established the territorial limits of the State. Congressional approval of the State Constitution set the State's boundaries, but it did not vest title to the land so included in the State. The public land owned by the United States in Florida, as in the other public land states, was not by statehood or by readmission to the Union deprived of its character as public land. The Secretary of the Interior retained his authority and the duty to ascertain and survey the public land within the State. The Act of March 3, 1845, ch. 63 § 7, 5 Stat. 742, 743, providing for the admission of Florida to the Union, expressly prohibited the State from interfering with federal ownership and disposal of public lands within the State. Nothing in the Reconstruction Act of March 2, 1867, cited by appellants, altered federal title to the public domain within Florida. See 14 Stat. 428.

We reject appellants' other arguments that the islands were not subject to survey and were not properly surveyed, asserted both in their appeal to this Board and in their statement of exceptions to the recommended decision, as without merit.

Accordingly, we conclude that greater than 50 percent of each legal subdivision on Pavilion and Mormon Key was not swamp and overflowed land on September 28, 1850, within the meaning of the Swamp Lands Act, 43 U.S.C. §§ 981-986 (1970), 12/ that the survey of the public land on the islands (Ex. 15) was properly executed, and the protest against the filing of the plat of survey properly rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the recommended decision of the Administrative Law Judge is adopted in part and the decision of the Chief, Division of Cadastral Survey, BLM, rejecting appellants' protest against the filing of the plat of survey affirmed.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

12/ The State of Florida, through the Board of Trustees of the Internal Improvement Trust Fund, was served with the survey and filed a protest in this case. The Board of Trustees was similarly served with copies of appellants' appeal to this Board, notice of hearing and the recommended decision. However, the Board of Trustees did not appeal to this Board, and did not appear at the hearing. We decline to rule on the State's pending Swamp Land application (see Ex. 12) at this juncture.